1991

Citicorp Mortgage v. Wayne E. Hardy : Reply Brief

Utah Supreme Court

Steven D. Brantley; Shapiro & Robinson; attorneys for appellant.
R. Clark Arnold; attorney for appellee.

IN THE UTAH SUPREME COURT

CITICORP MORTGAGE, INC.,	:	
	:	
Plaintiff and Appellant	:	
	:	Supreme Court No. 910035
v.	:	
	:	Priority No. 16
WAYNE E. HARDY,	:	
	:	
Defendant and Appellee.	:	

REPLY BRIEF OF APPELLANT

Appeal from the Third Judicial District Court of Salt Lake County, State of Utah
The Honorable Kenneth Rigtrup

Appealing an Order of Dismissal of Deficiency
Suit Following Power of Sale Foreclosure

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TABLE OF CASES AND AUTHORITIES

Pursuant to Rule 24(c), Rules of the Utah Court of Appeals, Plaintiff/Appellant CITICORP MORTGAGE, INC., submits the following Reply Brief in the above-entitled matter.

SUMMARY OF THE ARGUMENT

POINT I.

The filing of a Bankruptcy petition by Hardy stayed any action by Citicorp to proceed with its non judicial foreclosure action. When relief from the automatic stay was granted, Citicorp was permitted to go forward and foreclose on property owned by Hardy but the right to pursue a deficiency continued to be stayed. When Hardy was denied a discharge on May 15, 1989, pursuant to U.C.A. Section 57-1-32 and U.C.A. Section 78-12-41, Citicorp had three months within which to commence its deficiency action. Since its Complaint was filed on June 27, 1989, the dismissal of the Complaint was improper.

POINT II.

Citicorp was under no obligation to file a Proof of Claim in Hardy's bankruptcy and Hardy had no right to any notice of Citicorp's intention to seek a deficiency action, especially since the bankruptcy was filed under Chapter 7 of the Bankruptcy Code and it was listed as a "No Asset" case. Notice of the Petition specifically stated that no "Proofs of

Claim" should be filed and no further direction from the Bankruptcy Court was ever given to Plaintiff/Appellant directing that claims could be filed.

POINT III.

Hardy had as much knowledge as any borrower is awarded under Utah law that there was a possibility of a deficiency claim. The argument that Citicorp could or should have filed a Proof of Claim with the Bankruptcy Court is completely irrelevant.

POINT IV.

Hardy is not entitled to be awarded attorneys fees and costs incurred herein.

ARGUMENT

POINT I.

U.S.C.A. SECTION 108(c) ALLOWS FOR THE TIME PERIOD TO FILE A DEFICIENCY ACTION TO BE DETERMINED BY UTAH LAW. UNDER U.C.A. SECTION 78-12-41 AND U.C.A SECTION 57-1-32, CITICORP HAD THREE MONTHS TO FILE THE COMPLAINT AFTER THE DISMISSAL OF THE BANKRUPTCY ACTION.

Defendant/Appellee correctly identifies the issue at hand as to whether or not the three month limitation period under U.C.A. Section 78-12-41 was "suspended" or continued to run during the period of the Bankruptcy Stay. Defendant/Appellee cites *2 Collier on Bankruptcy,* 108.04 (15th Ed. 1991) for authority to justify his argument. However, said authority clearly states the following on page 108-14:

> "In some jurisdictions sate law may dictate suspension of a statute of limitations when a bankruptcy or another court proceeding has stayed the initiation of an action. Such suspensions would presumably be included within the terms of section 108(c), adding the entire duration of the automatic stay to the applicable time period."

This is exactly what Utah law does under U.C.A. Section 78-12-41. Citicorp was prevented from initiating a deficiency action during the time of the automatic stay. The code states that:

> "When the commencement of an action is stayed by injunction or a statutory prohibition the time of the continuance of the injunction or prohibition is not part of the time limited for the commencement of the action."

U.S.C.A. Section 108(c) specifically provides that

". . . such period does not expire until the later of --

(1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; or

(2) 30 days after notice of the termination or expiration of the stay under section 362, 722, 1201, or 1301 of this title, as the case may be, with respect to such claim.

Clearly, the later of 108(c)(1) or 108(c)(2) is the three month time period allowed under U.C.A. Section 57-1-32.

The case of *Ross Wilkey, Trustee v. Union Bank & Trust Company, et al., (In re Baird),* 63 Bankr. 60 (Bkrtcy. W.D. Ky. 1986) does nothing to further Defendant/Appellee's argument. In that case the Cause of Action arose before the filing of the bankruptcy petition while in the instant case the bankruptcy petition was filed before the Cause of Action arose. In the case of *John Morton v. National Bank of New York City (In re: Morton),* 866 F.2d 561 (2nd Cir. 1989), 19 BCD 85, is inapplicable to this case where we Utah has a specific statute dictating that the time for the limitation period to begin running doesn't start until the stay is no longer in effect. There was nothing for Citicorp to extend or renew in order to preserve its right to seek a deficiency judgment. All it could do is wait for the stay to be lifted. Citicorp was completely barred from pursuing any type of collection activity until that time.

The hypothetical propounded by Defendant/Appellee is inappropriate and inaccurate. Where fraud is the cause of the dismissal of a bankruptcy, it still may be good public policy to allow for the allowance of longer statutes of limitations to run. Citicorp should still have

had three (3) months to bring its deficiency action after the termination of the Stay had that even occurred on October 28, 1988. The result argued for by Defendant/Appellee would have only occurred had there been no bankruptcy stay in effect at the time of the trustee's sale but if the petition had been filed afterwards. In that way, the limitation period would have begun running from the day of sale and Citicorp would have had the later of whatever three month period remained after the lift of stay or the 30 day period.

POINT II.

CITICORP HAD NO OBLIGATION TO PROVIDE NOTICE OF ITS INTENTION TO SEEK A DEFICIENCY WITHIN THREE MONTHS FOLLOWING THE TRUSTEE'S SALE.

Defendant/Appellee had filed a bankruptcy petition under Chapter 7 and it was listed as a "No Asset" case. The Notice of Meeting of Creditors states "Do NOT file claims at this time". Citicorp was never notified by the Trustee that any assets had been located and that claims could be filed. Had that been the case, Citicorp would have filed a claim. However, this issue is completely irrelevant to the case at hand. Whether or not Citicorp had filed a Proof of Claim has no bearing on the matter. Defendant/Appellee received the same notice that every other debtor receives when a deficiency action is filed, i.e., service of summons and complaint. Debtors always have constructive notice that there is a possibility of a deficiency action whenever they are foreclosed upon by a secured creditor and the bid at sale is less than the total amount of the indebtedness as was the case here.

Defendant/Appellee argues that Citicorp should have foreseen the possibility of denial of discharge stating that they are not uncommon. Denials of discharge may be common when there has been a misrepresentation to the court of an "egregious nature" as was the case with the Defendant/Appellee but Citicorp had no way of knowing that Hardy had knowingly made a false oath to the bankruptcy court such that there would be a denial of discharge. Defendant/Appellee's argument on this point is illogical as well as being irrelevant to the matter at hand. Whether or not Citicorp had filed a Proof of Claim is immaterial to its right to seek a deficiency judgment.

POINT III.

PUBLIC POLICY REQUIRES THAT THE DISTRICT COURT'S DISMISSAL BE REVERSED

Citicorp did not discuss U.S.C.A. Section 108(c) in its brief for the simple reason that it is patently obvious that under that code section and U.C.A. Section 78-12-41 the limitation period clearly begins to run from the time the discharge was denied. There was no effort on the part of Citicorp to mislead the Court as alleged by Defendant/Appellee but only an effort to stick to the clear cut issues of the case and not waste the Court's time. The dismissal of Citicorp's Complaint was done by the lower Court without the opportunity for Citicorp to have a hearing on the issue of the statute of limitations. The Minute Entry of December 18, 1989 states that the case would be dismissed for failure to prosecute. That issue was addressed in Citicorp's Response to Court's Minute Entry. Citicorp was never afforded the opportunity to argue its position with respect to the statute of limitations.

POINT IV.

DEFENDANT/APPELLEE SHOULD NOT BE AWARDED HIS ATTORNEY'S FEES AND COSTS INCURRED IN THIS MATTER

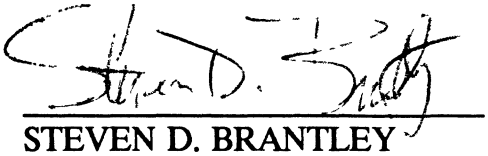
Citicorp did not have a fair opportunity to argue the issue of the statue of limitations with the trial court and since U.C.A. Section 78-12-41 clearly controls in this matter, there was no need to address U.S.C.A. Section 108(c) with the trial court. Citicorp did do its homework with respect to these issues and the result was a clear decision that U.C.A. Section 78-12-41 controls. Citicorp refused to withdraw its appeal because of the firm belief that its position is sound in this matter and to rule otherwise but be against the law, the cases and public policy.

CONCLUSION

Plaintiff contends that the language contained in 108(c), taken in conjunction with the provisions of Sec. 78-12-41 of the Utah Code Annotated (1953, as amended) make a good case for allowing the filing of the deficiency action after the fraud-based discharge denial. Further, the "notice" issue presented by the appellee has no practical relevance to the chapter seven liquidation bankruptcy in question, and serves only as a red herring. Finally, attorney's fees should not be awarded to appellee; a solidly justiciable issue has been presented to the Court for determination.

DATED this 26th day of August , 1991.

SHAPIRO & ROBINSON



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MAILING CERTIFICATE

I hereby certify that on the 26th day of August, 1991, I caused four copies of the foregoing Reply Brief to be hand-delivered to the following:

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